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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 17, ORIGINAL

EX PARTE IN THE MATTER OF THE BAKELITE CORPORATION, petitioner

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BRIEF ON BEHALF OF THE UNITED STATES COURT OF CUSTOMS APPEALS

OPINIONS BELOW

The opinion of the Court of Customs Appeals sustaining its jurisdiction on the appeal from the Tariff Commission is reported in 53 Treasury Decisions 716, and is printed in the petitioner's brief at page 30.

JURISDICTION

The action of this Court in entertaining jurisdiction of the petition for writ of prohibition to prevent the Court of Customs Appeals from exercising jurisdiction of an appeal from the findings of the Tariff Commission is apparently based upon

Section 262 of the Judicial Code (U. S. C. Title 28, Sec. 377), which provides that:

> The Supreme Court, the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

The original jurisdiction of this Court is restricted by the Constitution to cases affecting certain classes of parties and this case is not one of these. (*In re Massachusetts*, 197 U. S. 482, 487.)

The jurisdiction, if it exists, must rest on the clause in Section 2, Article III, giving appellate jurisdiction, subject to Congressional regulation.

While this proceeding is original in form, it is appellate in substance.

Marbury v. *Madison*, 1 Cranch, 137, 175.

Although without original jurisdiction, this Court may issue a writ of prohibition if it has appellate jurisdiction to review the decision of the court below.

In re Massachusetts, supra.

Jurisdiction to review by certiorari decisions of the United States Court of Customs Appeals in cases appealed from the Tariff Commission is granted (or attempted to be granted) by Section 316 of the Tariff Act of 1922, the validity of which is here in question. This case is peculiar, in that,

if the Court of Customs Appeals is held to be without jurisdiction, it may be because the section giving this Court appellate jurisdiction is void, but this Court can not hold it is without jurisdiction without first deciding that the clause in Section 316 for review by this Court on certiorari is void, and that requires a decision as to whether the appeal to the Court of Customs Appeals is a judicial case. This Court has jurisdiction to decide that much, and that is really the whole case, if all of Section 316 stands or falls together. Whether, if it be held that Section 316 is void, this Court should for that reason dismiss this petition for want of jurisdiction to entertain it, or issue the writ to the Court of Customs Appeals, is a point deserving consideration.

QUESTION PRESENTED

The principal question in this case is whether an appeal by an importer to the Court of Customs Appeals under Section 316 of the Tariff Act of 1922, to review the findings of the Commission that imported articles come into unfair competition with domestic industries, presents a judicial case or controversy under Section 2 of Article III of the Constitution. In this connection the feature of this case requiring particular scrutiny is that judicial review of the findings of the Tariff Commission occurs before final administrative action by the President, who is at liberty to refrain from further action because of disagreement with the

findings of the Commission, and the question thus arises whether at an intermediate stage of administrative action a judicial review of the administrative proceedings presents a case or controversy if following the judicial action the findings reviewed and approved by the court may be disapproved by administrative action and further proceedings discontinued.

This Court may also have occasion to consider whether the Court of Customs Appeals is an inferior court of the United States organized pursuant to Article III of the Constitution.

STATUTES

Section 316 of the Tariff Act of 1922 (Act of September 21, 1922, c. 356, 42 Stat. 858, 943; U. S. C. Title 19, Secs. 174–179) provides:

> SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any decisions under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such arti-

cles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, or, in what he shall be

satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shall be conclusive.

(f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided,* That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

* * * * *

Sections 315 and 317 are printed in Appendices A and B to this brief.

Article III of the Constitution provides:

> Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *

> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority * * *.

STATEMENT

This case is before this Court on the return of the judges of the United States Court of Customs Appeals to an order to show cause issued by this Court on petition of the Bakelite Corporation why a writ of prohibition should not issue forbidding the Court of Customs Appeals to entertain an appeal from findings of the Tariff Commission under Section 316 of the Tariff Act of 1922. The petition and return show that on December 16, 1925, the Bakelite Corporation and two of its customers filed with the United States Tariff Commission a complaint under oath asking relief under Section 316 of Title III of the Tariff Act of 1922, from unfair competition in the importation and sale of articles made of synthetic phenolic resin or "bakelite." The basis of the complaint was that such articles were being imported into the United States in violation of the patent rights of the Bakelite Corporation, and this was alleged to constitute unfair methods of competition. A hearing was had before the Commission on this complaint. On May 25, 1927, the Commission made its findings of fact and conclusions to the effect that unfair competition resulted from the importation of such articles, that

such unfair competition could not be offset by increase in the duties, and recommended that the President make an order forbidding the importation of such articles. The statement on page 3 of the return that the Commission made an order excluding the importations is inaccurate. What it did was to recommend that the President exclude them.

Thereupon, on July 8, 1927, Frischer & Co., Inc., and other companies claiming to be persons interested, filed a petition for review in the United States Court of Customs Appeals where a motion of the Bakelite Corporation to dismiss the appeal for want of jurisdiction came on to be heard. The Court of Customs Appeals held that it is an inferior court of the United States organized under Article III of the Constitution, and that the appeal presented a case or controversy within the judicial power, as defined in Article III, and denied the motion to dismiss. Thereupon the Bakelite Corporation was granted leave to file the petition in this case and the order to show cause was issued.

SUMMARY OF ARGUMENT

1. The fact that the petitioner itself invoked the jurisdiction of the Tariff Commission under Section 316 and obtained the order appealed from is not an insuperable objection to granting it relief here. It contends, not that the whole of Section 316 is void, but only that part of it allowing appeal to the Court of Customs Appeals. Besides, al-

though the petitioner did invoke the jurisdiction of the Commission, if Section 316 is invalid the petitioner is interested in not being required to respond to the appeal in the Court of Customs Appeals.

2. The question whether the appeal presented a case or controversy should be considered first, because this Court may not find it necessary to go further. In order to decide that question it is necessary to determine the meaning, operation, and effect of Section 316, and particularly whether the findings of the Commission are conclusive on the President or merely advisory. The action of the Commission and the President in raising duties or excluding importations under Section 316 is not entirely legislative or administrative as under Section 315. Its provisions are penal in their nature, imposing increased duties or exclusion of importations because of unfair competition. Because of this and the possible necessity of due process, the provision for judicial review was made. Here the judicial review comes not after administrative action is finished but midway in the administrative proceedings. Although the provisions of the section are somewhat conflicting and ambiguous, their fair meaning is that if the Commission finds there is no unfair competition, its finding is binding on the President and he may not adopt a different conclusion and raise duties or exclude articles; that if the Commission finds that there is unfair competition and recommends action by the President, he is

at liberty to reach a different conclusion and refuse to act. The result is that the findings of the Commission are controlling on the President in the sense that if he acts it must be in accordance with the Commission's findings. The case, therefore, is that the findings of the Commission form a final and indisputable basis of action by the President, *if he acts*, but he has the power to disapprove the findings and take no action, and the question is whether this prevents the appeal from the Tariff Commission's findings constituting a case or controversy.

3. It has been held that where the law provides that action of an administrative body, although reviewed and approved by a court, is merely advisory or subject to later revision by administrative officers, the application for judicial review does not present a case or controversy under the Constitution. In *Fidelity National Bank* v. *Swope*, 274 U. S. 123, this Court held that an intermediate judicial review of administrative proceedings to be followed by further administrative action constituted a case or controversy where the decision formed a final basis for further administrative action, although the administrative officials were at liberty to discontinue all proceedings. If we may accept that decision as authority for the rule that application for judicial review of administrative action does not fail to present a case or controversy merely because the administrative officers may do nothing further, the fact that the President may decline to

approve the findings of the Tariff Commission is not fatal to the contention that the appeal to the Court of Customs Appeals presented a judicial case.

4. If the Court holds that there was no case or controversy, it need not inquire whether the Court of Customs Appeals is a constitutional court, because Section 316 confers jurisdiction on this Court to review by certiorari, and that provision is void if there is no case or controversy, and we can not assume that Congress would have granted these powers to the Tariff Commission without review by this Court. The result would be that all the provisions of Section 316 must stand or fall together. If it is concluded that there was a case or controversy, there may be no occasion to inquire whether the Court of Customs Appeals is a constitutional court.

5. The Court of Customs Appeals is a constitutional court. If the intention of Congress is a test, that intention is fully disclosed by its treatment of the subject, including its assumption that the judges have life tenure. If the jurisdiction conferred on the court is the test, it is fulfilled, because its jurisdiction has been limited to reviewing decisions of the Customs Court as to classification of imported merchandise and raising of duty under the Tariff Acts, and these are questions arising under the laws of the United States and within the judicial power defined in Article III of the Constitution. Its jurisdiction is not limited to cases

arising in Territories or the District of Columbia, but throughout the States as well. The addition to its jurisdiction of appeals from the Tariff Commission would still leave it with jurisdiction only of cases arising under the laws of the United States.

ARGUMENT

I

THE PRELIMINARY QUESTION IS WHETHER THE FINDINGS OF THE COMMISSION ARE CONCLUSIVE ON THE PRESIDENT OR MERELY ADVISORY

To determine whether appeals authorized by Section 316 present cases or controversies under the Federal judicial power, as defined in Article III of the Constitution, it is necessary, first, to determine the operation and effect of Section 316. If the Commission's findings are merely advisory and the President is at liberty to disregard them and reach his own conclusion, and if he may find that unfair competition exists where the Commission has ruled otherwise, and if he may also find that unfair competition does not exist when the Commission has held that it does, it would follow that no case or controversy is presented by the appeal from the Commission's findings, because the judgment of the court would be merely advisory and would have no binding effect on the rights of the parties or on further administrative action. The section should be construed, as far as possible, to make its provisions

constitutional. The various clauses to the effect that the order raising duties or excluding merchandise may be made when the President finds that unfair competition exists, and when it has been established to his satisfaction that it exists, may not be disregarded. Although the Commission finds unfair competition to exist, no order increasing duties or excluding importations shall be made unless the President is himself convinced and agrees with the findings. The provisions to the effect that the findings of the Commission shall be conclusive, and the findings of the courts on review shall be conclusive do not mean that they are conclusive on the President. There is a statement in subdivision (e) that the decision of the President shall be conclusive. These words mean that where findings are made of unfair competition, and the President confirms them and higher duties are imposed, or importations are excluded, these findings are conclusive on importers and prevent them from questioning the new duties or the order of exclusion, either on appeal from the collector to the Customs Court or in any other tribunal.

On the other hand, the section does not necessarily mean that if the Commission finds against the charge of unfair competition the President may overrule that finding and reach the contrary conclusion and order duties raised or merchandise excluded. Nothing in the Act requires such an interpretation.

This section originated in the Senate Committee on Finance. A copy of it as reported by that Committee is set forth in Appendix C to this brief, page 48. At that stage it provided that the preliminary inquiry to assist the President should be made by such Department or Bureau as he might designate. The bill, as reported by the Committee, was amended in the Senate, and as amended and passed by the Senate and as it went to conference it is set forth in Appendix D hereto, page 52. The general purpose of the section, as stated by the report of the Senate Committee, was "to impose penalty duties or prohibit the importation of particular goods for the purpose of preventing unfair methods of competition in the importation of goods." (Senate Report No. 595, 67th Congress, 2nd Sess., p. 3.) A further explanation by Senator Smoot of its purpose was as follows (Cong. Rec. Vol. 62, Pt. 6, p. 5879):

> *Dumping and other unfair methods of competition in importation.*
>
> Dumping and other unfair methods of competition in importation have been recognized as a menace, particular under post-war conditions, to American industries. For this reason the bill permits the President to impose additional duties on goods imported into the United States by any person or corporation found guilty of dumping or other unfair methods of competition in

importation, and in extreme cases he may prohibit such importations. If any doubt whatever exists as to the effectiveness of the tariff rates and the provisions of the elastic tariff as means to protect the coal-tar dye industries, the addition of this effective unfair competition statute should remove it. We have in this measure an antidumping law with teeth in it—one which will reach all forms of unfair competition in importation. This section (316) not only prohibits dumping in the ordinary accepted meaning of that word: that is, the sale of merchandise in the United States for less than its foreign market value or cost of production; but also bribery, espionage, misrepresentation of goods, full-line forcing, and other similar practices frequently more injurious to trade than price cutting.

The antidumping statute which we enacted as a part of the emergency tariff is not sufficiently broad in its scope nor flexible enough in its administrative provisions. Furthermore, an antidumping statute, I believe, should not be confused with customs administration. It should not, on the one hand, hinder the usual and fair importation of goods; but, on the other, it should prevent effectively those importations which are injuring unfairly American business. The administration of a dumping statute involves primarily a study of the effect upon American industries of foreign trade practices, and when any person is found guilty

> of any unfair practice tending to injure substantially or destroy an American industry he should be compelled to pay a penalty or be prohibited from bringing goods into the United States until such unfair practices are conclusively discontinued. This is provided for in the Senate bill.
>
> In the economic uncertainty of the present, manufacturers in some lines of merchandise have asked for high tariff rates more because of what they fear than because of what they are experiencing. Such a law as I have suggested would assure American producers that they will not be subjected to unfair competition from countries abroad.

The Senate amended the Committee Bill by making the Tariff Commission the body to investigate and report. The provision for appeal to the Court of Customs Appeals was in the section as it came from the Committee. Senator McCumber, then chairman of the Committee, said (Cong. Rec. Vol. 62, Pt. 11, p. 11241):

> *Mr. McCumber.* Mr. President, I will state generally that subdivision (a) of section 316 provides that unfair methods of competition and unfair acts in the importation of merchandise the tendency of which is to destroy or substantially injure any industry efficiently and economically operated in the United States or to prevent the establishment of such an industry or to restrain or monopolize trade and commerce in the United States is declared to be unlawful.

Subdivision 2 of section 316 authorizes the imposition of penalty duties or the prohibition of the importation of particular merchandise for the purpose of preventing unfair methods of competition in such importation. Subdivision (b) as originally reported to the Senate authorized the President to select the agency to investigate any alleged violation of the section. The amendment now offered specified that the Tariff Commission shall make the investigation.

Discussion arose in the Senate as to whether the section contemplated a general raise in duties on all articles of a class, action purely legislative or administrative in character, such as is provided in Section 315, to meet differences in cost of production at home and abroad, or whether the penalty of added duties or exclusion was limited to particular importers or particular articles involved in unfair competition. (See Cong. Rec. Vol. 62, Pt. 11, p. 11241, 67th Congress, 2d Session.) To make it clear that the action was in the nature of a penalty limited to offenders and offending articles, amendments were adopted to subdivision (e) to the effect that the additional duties were only "upon articles imported in violation of this Act." (Appendix E, p. 58. See extracts from the Congressional Record, pages 51 and 57, petition and brief for Frischer & Co.)

There have been 24 cases dealt with by the Commission under Section 316. A chart of them and their disposition is in Appendix F hereto at page

60. All but six of these were dismissed before the Commission. In five of the six, findings were submitted to the President and approved by him. The sixth case is the one here involved pending on appeal in the Court of Customs Appeals and not yet submitted to the President. A digest of the five cases submitted to the President is in Appendix G to this brief, page 61.

The significant thing is that in each case the President's practical construction of Section 316 was that findings by him were required. In the three cases in which the Commission found that unfair competition existed, the President in his orders stated that he was satisfied and found that unfair competition existed. Of the two cases in which the Commission found against the charge of unfair competition, in one the President merely approved its findings, and in the other he stated that he was not satisfied that unfair competition existed.

Section 315 of the Tariff Act (Appendix A, p. 39) deals with increases or decreases of duty to meet differences in cost of production at home and abroad. See *J. W. Hampton & Co.* v. *United States*, 276 U. S. 394. It contemplates findings by the President. Section 317 of the Tariff Act (Appendix B, p. 44) provides for retaliatory duties in case of unreasonable charges or discrimination by foreign countries, and uses similar expressions about findings by the President. The amendments to Section

316 made in conference are not without significance (Appendix E, p. 56). The "findings" were left to the Commission and the "decision" to the President. There can be no doubt that in all three of these sections Congress intended to provide a check upon the action of the Tariff Commission, and that in Section 316 its purpose was to provide that additional penalty duties or the exclusion of importations should not be ordered unless the President himself was satisfied with the findings of the Commission, and the statute does not make the Commission's findings, when approved by the courts any more binding on the President than the findings of the Commission where no appeal is taken.

II

THE APPEAL TO THE COURT OF CUSTOMS APPEALS PRESENTS ALL THE ELEMENTS OF A CASE OR CONTROVERSY UNLESS THE PRESIDENT'S POWER TO DISCONTINUE PROCEEDINGS BECAUSE OF HIS NONCONCURRENCE IN THE COMMISSION'S FINDINGS IS A FATAL OBJECTION

A general review of the decisions as to what is a "case" is not necessary. The subject is fully dealt with in the briefs of other counsel, and in the opinion of the Court of Customs Appeals. There is a long line of decisions in this Court on the point.

Hayburn's Case, 2 Dallas 409.

Osborn v. *United States Bank*, 9 Wheat. 738, 819.

Kendall v. *United States*, 12 Pet. 524.

United States v. *Ferreira*, 13 How. 39.

Murray's Lessee v. *Hoboken Land and Improvement Company*, 18 How. 272, 284.

Gordon v. *United States*, 117 U. S. 697.

United States v. *O'Grady*, 22 Wall. 641.

United States v. *Jones*, 119 U. S. 477.

Smith v. *Adams*, 130 U. S. 167, 173.

In Re Sanborn, 148 U. S. 222, 225.

Interstate Commerce Commission v. *Brimson*, 154 U. S. 447, 487.

Stephens v. *Cherokee Nation*, 174 U. S. 445, 477.

Pacific Whaling Company v. *United States*, 187 U. S. 447, 451.

Alexander v. *United States*, 201 U. S. 117.

Frasch v. *Moore*, 211 U. S. 1.

Muskrat v. *United States*, 219 U. S. 346.

Fairchild v. *Hughes*, 258 U. S. 126.

Keller v. *Potomac Electric Company*, 261 U. S. 428.

New Jersey v. *Sargent*, 269 U. S. 328.

Tutun v. *United States*, 270 U. S. 568.

Postum Cereal Company v. *California Fig Nut Company*, 272 U. S. 693.

Liberty Warehouse Company v. *Grannis*, 273 U. S. 70.

Fidelity National Bank v. *Swope*, 274 U. S. 123.

Federal Trade Commission v. *Eastman Kodak Company*, 274 U. S. 619, 623.

The appeal from the Tariff Commission to the Court of Customs Appeals has adversary parties. They are the importer or consignee who takes the appeal and the public, represented by the Commis-

sion, as respondent, with the possible addition of complaining domestic manufacturers or dealers.

The appeal involves the application of existing law to the facts found, and the determination whether there has been unfair competition. There is a determination of rights, that is, whether the importer who appeals has a right to import at regular tariff rates or because of business misconduct is subject to higher duties or the exclusion of his merchandise.

The action of the court is not of an administrative character.

If the order for higher duties or exclusion is made by the President and goes into effect, the judgment of the court on appeal from the Commission is conclusive against importers who are not allowed in any other tribunal or place to question as against the Government the finding that there has been unfair competition, subjecting them to the increased duty or the order of exclusion.

If the statute provided for review by the court after action by the President, or if the findings of the Commission were made conclusive on the President and he was required to accept them and make the order, there would be no doubt that the appeal to the Court of Customs Appeals would present a case or controversy. The statute relating to review of orders of the Federal Trade Commission requiring persons to desist from unfair competition differs from the one here under consideration in that the judicial review takes place after final

action by the Commission, and the court enforces the order or vacates it. The statute authorizing appeal to the United States Circuit Courts of Appeals from decisions of the Board of Tax Appeals likewise differs from this one, because there the action of the court finally concludes the rights of the parties and such further administrative action as is taken must be in accordance with the decision and the Treasury Department is bound to proceed to close the case on the basis of the court's decision.

It is well settled that if the conclusion of a court in any such matter is subject to revision in an administrative department, there is no case or controversy within the judicial power. (*In re Sanborn*, 148 U. S. 222.) This case is not exactly that. We have shown that the statute does not contemplate that if the Commission finds there is no unfair competition, the President may reverse that finding and make an order for higher duties or exclusion of importations. He can not make such an order unless there is a finding of the Commission (affirmed by the Court of Customs Appeals if there has been an appeal to that court) that unfair competition exists, but he is not obliged to concur in the Commission's findings to that effect and make an order. The statute does not make the findings of the Commission more conclusive on the President where they are affirmed by the Court of Customs Appeals or by this Court on certiorari than such findings would be without such judicial review.

The result is that there is no assurance that after the court acts on the appeal, the President will take any further action, and the question is presented whether this situation deprives the judgment of the court of that finality and effective operation which are essential to a judicial judgment. As a practical matter the President may never be disposed to reject the findings of the Commission, approved by the court, that unfair competition exists. Nevertheless, under the statute he has that power.

Whether the judgment of the Court of Customs Appeals finally disposes of the matter depends on which way its decision goes. If the findings of the Commission are reversed, that seems to end the proceeding. If the finding of unfair competition is affirmed, it is still open to the President to reject the finding. The case is much the same as if a suit in equity were brought against an administrative body to restrain it from making an advisory report to an executive officer, which if accepted and approved by him would result in executive action affecting the plaintiff's interest. Doubtless such a suit would not be entertained.

The peculiarity of this case rests in the fact that judicial review is intermediate between the beginning and the end of administrative proceedings and does not review the final action of the administrative authority. A case which resembles this is the recent case of *Fidelity National Bank* v. *Swope*, 274 U. S. 123. There the charter of the city of Kansas City relating to public improvements pro-

vided for the adoption of an ordinance by the City Council authorizing an improvement and determining the benefited district and directing that the lands within the district should be assessed in proportion to their value. At that stage the administrative proceedings paused and, as provided by the law, judicial proceedings were instituted in the Circuit Court against the property owners and by the city for the purpose of determining the validity of the ordinance and of the lien for the cost of the improvement. The charter provided that after the determination of the validity of the prior administrative proceedings the administrative authorities could then proceed to complete the proceedings by apportioning the cost and levying the assessment.

The question presented in this Court was whether the resort to the court before the completion of the administrative proceedings presented a case or controversy within the Federal judicial power, and this Court answered that question in the affirmative. There, as here, a pause took place in the administrative proceedings before their completion for the purpose of a judicial inquiry as to the validity of what had been done, to be followed by completion of the administrative proceedings.

In the opinion the Court did not discuss the question whether the state statutes or city charter allowed the administrative authorities to abandon the proceedings after the judicial inquiry. The appellees' brief in that case (p. 86) states:

> In fact there was no certainty that this grading work would be done or that any contract ever would be let therefor or that any tax would be issued. * * * No contract had been let, no grading work had been done and it was not certain that any tax bills would ever be issued to become a lien upon the property in question.

The brief then cited *Tregea* v. *Modesta Irrigation District*, 164 U. S. 179, 185, quoting the following from the opinion of Mr. Justice Brewer:

> But going beyond this matter, we are confronted with the question whether, in advance of the issue of bonds and before any obligation has been assumed by the district, there is a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration and judgment. This is no mere technical question. For, notwithstanding the adjudication by the courts of the State in favor of the validity of the order made for the issue of four hundred thousand dollars of bonds, and, notwithstanding any inquiry and determination which this court might make in respect to the matters involved, there would still be no contract executed; no obligation resting on the district. All that would be accomplished by our affirmance of the decision of the state court would be an adjudication of the right to make a contract, and, unless the board should see fit to proceed in the exercise of the power thus held to exist, all the time and labor of the court would be spent in deter-

mining a mere barren right—a purely moot question.

The extract from the charter of Kansas City quoted in the note to the opinion in *Fidelity National Bank* v. *Swope* provides, after dealing with the judicial proceeding to determine the validity of the preliminary action—

> If no appeal shall be taken, or after determination of such appeal, the city may enter into a contract with the successful bidder to whom such work may be let * * *.

An examination of the charter of the city discloses provisions indicating that it was within the power of the city to discontinue the improvement proceedings after the end of the judicial proceedings at any time before the contract for the construction of the improvement was finally confirmed. The provision is—

> The Board of Public Works, at any time before any contract is so ratified, approved and confirmed, may rescind by an order entered on the records of said Board, the action of said Board in signing said contract in behalf of the city, and thereupon all proceedings had in relation to such proposed improvement shall be null and void. [*Charter and Ordinances of Kansas City, Annotated, Turpin, Kingsley, Shannon*, 1909, p. 313.]

We assume, therefore, that in deciding the *Fidelity National Bank case*, this Court had in mind the fact that it was within the power of the city to discontinue all further proceedings after the judicial

determination of the validity of the preliminary administrative action and that the existence of this power did not prevent the judicial inquiry from constituting a case or controversy within the Federal judicial power.

If we may accept the decision in the *Fidelity National Bank case* as authority for the proposition that an intermediate judicial review of preliminary administrative proceedings may present a case or controversy, notwithstanding the possibility that no further action may ever be taken by the administrative authorities, then it may be said that the power of the President to refuse concurrence in the findings of the Commission and of the courts reviewing them and to discontinue the proceedings without further action does not prevent the judicial review of the Commission's action from constituting a case or controversy.

Some distinctions may be noted between this case and the *Fidelity National Bank case*. In the latter the power of the administrative authorities to discontinue proceedings after judicial review did not rest on disagreement with the judicial conclusion but on reasons of policy, while here the power of the President to discontinue the proceedings and refuse to make the final order must rest on his disapproval of the findings of the Commission and of the courts if the Commission's findings have been reviewing them and to discontinue the proceedciple. In each case the power to discontinue existed and the reason for it is immaterial. In this

case, therefore, this Court is confronted with the question whether the constitutional courts of the United States, including this Court, have power before administrative proceedings are completed to review judicially the preliminary action, where under the law the administrative authorities for one reason or another have power to discontinue the proceedings and render the judicial judgment inoperative and moot.

Unless the decision in *Fidelity National Bank* v. *Swope* goes that far, we have been unable to find any decisions of this Court which seem to do so.

III

THIS COURT MAY FIND IT UNNECESSARY TO DO MORE THAN DECIDE WHETHER THE APPEAL TO THE COURT OF CUSTOMS APPEALS PRESENTS A CASE OR CONTROVERSY

Section 316 of the Tariff Act of 1922 attempts to confer upon this Court power to review the decisions of the Court of Customs Appeals on appeals from the orders of the Tariff Commission under the section. If such an appeal to the Court of Customs Appeals does not present a case or controversy within the Federal judicial power, this Court has no power to review the decision on certiorari, and the clause in Section 316 for certiorari from this Court is void. If that be so, the question remains whether the clause giving jurisdiction to this Court on certiorari is separable from the rest of the sec-

tion. We doubt it. *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 112.

The jurisdiction of this Court, if it exists, rests only on Section 316. The jurisdiction of this Court to issue writs of certiorari to review judgments of the Court of Customs Appeals was first conferred by the Act of August 22, 1914, c. 267, 38 Stat. 703, amending Section 195 of the Judicial Code. The jurisdiction of the Court of Customs Appeals was then limited to reviewing decisions of the Board of General Appraisers, afterwards named the United States Customs Court, on questions of classification of merchandise and rates of duty, and by the Act of August 22, 1914, the jurisdiction of this Court to review such decisions of the Court of Customs Appeals was limited to cases where there is drawn in question the construction of the Constitution of the United States or of treaties or to cases in which the Attorney General has filed a certificate of importance with the Court of Customs Appeals before its decision.

The Act of February 13, 1925, amending the provisions of the Judicial Code relating to the appellate jurisdiction of this Court, does not deal with the Court of Customs Appeals. If it has any application, it is only in Section 8 (a) limiting the time for applying for certiorari to three months from the date of the judgment. The result is that, but for the provisions for certiorari in Section 316 of the Tariff Act, this Court would be without juris-

diction to review the decisions of the Court of Customs Appeals in Tariff Commission cases.

Section 316 attempted to confer that jurisdiction. We do not feel able to assert that Congress would have enacted Section 316 and given the Commission the powers therein defined without review by this Court any more than we could say that it would have given the Commission and the President such powers without review by any court.

Section 645 of the Tariff Act of 1922 provides:

> If any clause, sentence, paragraph, or part *of this title* shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of said Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. (Italics ours.)

The title referred to is Title IV.

Section 316 is found in Title III.

There is no similar saving clause relating to Section 316.

On the other hand, if this Court concludes that a case or controversy is presented by the appeal to the Court of Customs Appeals, we see no occasion for proceeding further and deciding whether the Court of Customs Appeals is a constitutional court.

We also refer to what has been said on page 1 of this brief on the jurisdiction of this Court, and which bears on the question whether, if it be held

there is no case or controversy before the Court of Customs Appeals, this Court may inquire into other questions, or must dismiss this petition for want of jurisdiction to entertain it.

IV

THE UNITED STATES COURT OF CUSTOMS APPEALS IS AN INFERIOR COURT OF THE UNITED STATES ORGANIZED PURSUANT TO ARTICLE III OF THE CONSTITUTION, WITH JURISDICTION LIMITED TO CASES WITHIN THE FEDERAL JUDICIAL POWER

A short review of the legislation leading up to the organization of the court is desirable.

The Act of June 10, 1890 (c. 407, 26 Stat. 131, 136), and of May 27, 1908 (c. 205, 35 Stat. 403, 405), provided that import cases should be dealt with by the Board of General Appraisers on appeal from the decisions of the Collector and that the decisions of the Board of General Appraisers should be subject to review by the United States Circuit Courts of Appeals. The Act creating the Board of General Appraisers provided that the General Appraisers might be removed by the President.

Either the Board of Appraisers (now called United States Customs Court) is not an inferior court of the United States under Article III of the Constitution or the clause for removal of its members is invalid. The Act provided that the Circuit Courts of Appeals should review the decisions of the Board of General Appraisers de novo and that appeals by the importers to this Court might be allowed by the Circuit Courts of Appeals

if those courts considered the cases of sufficient importance and an appeal by the United States to this Court was to be allowed whenever the Attorney General applied for it.

The Act of 1908 required that all evidence considered by the Circuit Courts of Appeals should be received before the Board of General Appraisers, thus limiting the Circuit Courts of Appeals to review of the action of the Board without a hearing de novo. That Act also had a provision that this Court might review decisions of the United States Circuit Courts of Appeals in the import cases, as in other cases under the Act creating the United States Circuit Courts of Appeals.

By an Act approved May 28, 1926 (c. 411, 44 Stat. 669), Congress changed the name of the Board of General Appraisers to United States Customs Court. That was done for the purpose of enabling the Customs Court to be recognized as a court in foreign countries when seeking depositions. (Cong. Rec., Vol. 67, Pt. 5, p. 4796, 69th Cong., 1st Sess.)

The United States Court of Customs Appeals was created by the Act of August 5, 1909, c. 6, 36 Stat. 11, 105, Section 28. The Act did not define the tenure of the Judges, proceeding evidently on the theory that the court was a constitutional court and its Judges had tenure during good behavior. The Act provided (p. 106):

> The Court of Customs Appeals established by this Act shall exercise exclusive appellate

> jurisdiction to review by appeal, as provided by this Act, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said Board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues * * *.

Its decisions were made final. Review of its decisions by this Court on certiorari was first authorized by the Act of August 22, 1914, c. 267, 38 Stat. 703.

If the intention of Congress as to the creation of a constitutional court is the test, the United States Court of Customs Appeals is a constitutional court. It was styled the United States Court of Customs Appeals. It was made a court of record in all respects. The absence of a provision fixing the terms of office of the Judges shows the understanding of Congress that the court was a constitutional court and that its Judges should hold office during good behavior, as provided in Article III of the Constitution. In all its dealings with the court the Congress has treated it as an inferior constitutional court.

If the jurisdiction conferred upon it is the test, it is a constitutional court. The Act creating it confined its jurisdiction to "cases." Its jurisdic-

tion was carved out of the jurisdiction formerly conferred upon the United States Circuit Courts of Appeals, which are constitutional courts.

The cases which it has power to deal with are cases arising under the laws of the United States and within the Federal judicial power, as defined in the Constitution. Prior to the Tariff Act of 1922 its only jurisdiction was with respect to interpretation and application of Acts of Congress relating to imports, enacted pursuant to the commerce clause and to the clause authorizing Congress to levy duties. This jurisdiction was not limited to cases originating in the territories or in the District of Columbia, but included those originating in States.

The difference between constitutional courts, and legislative courts established pursuant to those clauses in the Constitution authorizing Congress to govern the territories and the District of Columbia, has been dealt with in the following cases:

Keller v. *Potomac Electric Co.*, 261 U. S. 428.

Kendall v. *United States*, 12 Pet. 524, 619.

The City of Panama, 101 U. S. 453, 460.

Clinton v. *Englebrecht*, 13 Wall. 434, 447.

American Insurance Co. v. *Canter*, 1 Pet. 511, 546.

McAllister v. *United States*, 141 U. S. 174.

The subject has been ably dealt with in the opinion of the United States Court of Customs Appeals in its decision in the appeal from the Tariff Commission.

The petitioner contends that as the Tariff Commission is not a court and the Court of Customs Appeals is an appellate court, it can not consider the appeal. Of course that is fallacious. The Constitution does not limit any inferior Court to appellate jurisdiction, and Congress may give any inferior court original jurisdiction.

There is pending in Congress legislation to transfer from the Court of Appeals of the District to the United States Court of Customs Appeals jurisdiction to review decisions of the patent commissioner. It has been held that review of such decisions constitutes an administrative act because, notwithstanding the decision on the appeal from the patent commissioner interested parties are not concluded nor prevented from litigating the same questions in suits in equity. *Postum Cereal Company* v. *California Fig Nut Company*, 272 U. S. 693.

The Court of Appeals of the District has been held to be a legislative and not a constitutional court, with power to deal with administrative questions which may not be dealt with by a constitutional court.

Because of the pendency of this legislation it will be a source of regret if the character of the United States Court of Customs Appeals is not determined in this case.

In connection with that legislation there was inserted in the Congressional Record an interesting memorandum dealing with this subject. (Con-

gressional Record, 69th Congress, 2nd Session, Vol. 68, pt. 3, page 3181.) A copy of that memorandum is in the Appendix H to this brief, page 64.

The suggestion there made is that aside from the power to organize inferior courts conferred by Article III, Congress has implied power to organize courts to deal with its debts, its own taxes, its own grants, and its own obligations, and that the United States Court of Customs Appeals may be such a court. If such an implied power exists, we do not see why the action of Congress in creating the United States Court of Customs Appeals should be ascribed to it.

If a court organized under Act of Congress has all the characteristics of a court under Article III and only the jurisdiction of such a court, and its judges have the qualifications and tenure of judges of such a court, it would seem to be an inferior court of the United States under Article III.

Some of the judicial power which, it is said, may be conferred upon courts organized under an implied power, is such as may be given to inferior courts of the United States organized under Article III. The express power under Article III and the suggested implied power would therefore seem to overlap. Article III protects the tenure of office and compensation of judges of courts organized under it, but there is no such protection for judges of courts organized under any other power. Surely, Article III authorizes the creation of an

inferior court of the United States of just such a court as the Court of Customs Appeals.

CONCLUSION

Whether a case or controversy is presented by the appeal to the Court of Customs Appeals from the findings of the Tariff Commission depends on whether the power of the President to discontinue the proceedings because of his nonconcurrence in the findings of the Commission, confirmed by the court on appeal, takes away an essential element of a judicial case or controversy by making the judgment inoperative and the decision moot.

Whatever conclusion the Court may reach on the foregoing question, it seems unlikely that it will be necessary to decide whether the United States Court of Customs Appeals is an inferior court of the United States, but if this Court proceeds to the decision of that question the conclusion should be that it is.

Respectfully submitted.

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JANUARY, 1929.

APPENDIX A

SECTION 315 OF THE TARIFF ACT OF 1922

(a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country, he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total in-

crease or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found,

upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production under the provisions of subdivisions (a) and (b) of this section the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government or by a person, partnership, corporation, or

association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to

those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

APPENDIX B

SECTION 317 OF THE TARIFF ACT OF 1922

(a) That the President when he finds that the public interest will be served thereby shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of any foreign country whenever he shall find as a fact that such country—

Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country;

Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

(b) If at any time the President shall find it to be a fact that any foreign country has not only dis-

criminated against the commerce of the United States, as aforesaid, but has, after the issuance of a proclamation as authorized in subdivision (a) of this section, maintained or increased its said discriminations against the commerce of the United States, the President is hereby authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such articles of said country as he shall deem the public interests may require shall be excluded from importation into the United States.

(c) That any proclamation issued by the President under the authority of this section shall, if he deems it consistent with the interests of the United States, extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President shall, whenever he deems the public interests require, suspend, revoke, supplement, or amend any such proclamation.

(d) Whenever the President shall find as a fact that any foreign country places any burdens upon the commerce of the United States by any of the unequal impositions or discriminations aforesaid, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty as he shall determine will offset such burdens, not to exceed 50 per centum ad valorem or its equivalent, and on and after thirty days after the date of such proclamation there shall be levied, collected, and paid upon the articles enumerated in such proclamation when imported into the United States from such foreign country such new or additional rate or rates of duty; or, in case of articles declared subject to exclusion from importation into the United

States under the provisions of subdivision (b) of this section, such articles shall be excluded from importation.

(e) Whenever the President shall find as a fact that any foreign country imposes any unequal imposition or discrimination as aforesaid upon the commerce of the United States, or that any benefits accrue or are likely to accrue to any industry in any foreign country by reason of any such imposition or discrimination imposed by any foreign country other than the foreign country in which such industry is located, and whenever the President shall determine that any new or additional rate or rates of duty or any prohibition hereinbefore provided for do not effectively remove such imposition or discrimination and that any benefits from any such imposition or discrimination accrue or are likely to accrue to any industry in any foreign country, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty upon the articles wholly or in part the growth or product of any such industry as he shall determine will offset such benefits, not to exceed 50 per centum ad valorem or its equivalent, upon importation from any foreign country into the United States of such articles and on and after thirty days after the date of any such proclamation such new or additional rate or rates of duty so specified and declared in such proclamation shall be levied, collected, and paid upon such articles.

(f) All articles imported contrary to the provisions of this section shall be forfeited to the United States and shall be liable to be seized, prosecuted, and condemned in like manner and under the same

regulations, restrictions, and provisions as may from time to time be established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws. Whenever the provisions of this Act shall be applicable to importations into the United States of articles wholly or in part the growth or product of any foreign country, they shall be applicable thereto whether such articles are imported directly or indirectly.

(g) It shall be the duty of the United States Tariff Commission to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subdivisions (a), (b), and (e) of this section are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the commission to bring the matter to the attention of the President, together with recommendations.

(h) The Secretary of the Treasury, with the approval of the President, shall make such rules and regulations as are necessary for the execution of such proclamations as the President may issue in accordance with the provisions of this section.

(i) That when used in this section the term "foreign country" shall mean any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced.

APPENDIX C

SECTION 316 OF THE TARIFF ACT OF 1922 AS INSERTED IN THE BILL BY REPORT OF SENATE COMMITTEE ON FINANCE

SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of merchandise into the United States, or in its sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monoplize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any findings under this section jurisdiction is hereby conferred upon the executive department or independent establishment of the Government, or both acting in cooperation, which he shall designate to investigate any alleged violation hereof on complaint under oath or upon the initiative of such department or independent establishment.

(c) That such department or establishment shall make such investigation under and in accordance

with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by such department or establishment such rehearing with opportunity to offer evidence, oral or written, as may be deemed by such department or establishment sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of such department or establishment shall be the official record of the proceedings and decision in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such merchandise; that such findings and decision, if supported by evidence, shall be conclusive, unless a rehearing shall be granted by such department or establishment, or unless, within such time after entry of said decision and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal shall be taken from said finding and decision upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such merchandise; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before such department or establishment, said court may order such additional evidence to be taken before such department or establishment in such manner and upon such terms and conditions

as to the court may seem proper; that such department or establishment may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts unless within such time and in such manner an appeal shall be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of such department or establishment shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such merchandise as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon such merchandise, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such merchandise as he shall deem the interests of the United States shall require shall be excluded from entry into the United States, and upon information of such action by the President the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the findings of the President shall be conclusive, unless within ten days thereafter he shall revoke or modify the same, in

which case such revocation or modification shall be conclusive.

(f) That whenever the President shall find as a fact that any merchandise is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided*, That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

APPENDIX D

SECTION 316 OF THE TARIFF ACT OF 1922 AS IT FIRST PASSED THE SENATE AND WENT TO CONFERENCE

[Amendments made to section as reported by Finance Committee are shown, omitted matter in brackets, and new matter in italics.]

(1666) SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of merchandise into the United States, or in its sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any findings under this section [jurisdiction is hereby conferred upon the executive department or independent establishment of the Government, or both acting in cooperation, which he shall designate] *the United States Tariff Commission is hereby authorized* to investigate any alleged violation hereof on complaint under oath or upon the initiative of such department or independent establishment.

(c) That [such department or establishment] *the commission* shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by [such department or establishment] *the commission* such rehearing with opportunity to offer evidence, oral or written, as [may be deemed by such department or establishment] *it may deem* sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of [such department or establishment] *the commission* shall be the official record of the proceedings and decision in the case, and in any case where the findings in such investigation show a violation of this section a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such merchandise; that such findings and decision, if supported by evidence, shall be conclusive, unless a rehearing shall be granted by [such department or establishment] *the commission,* or unless, within such time after entry of said decision and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal shall be taken from said finding and decision upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such merchandise; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before [such department or establishment] *the commission,* said court

may order such additional evidence to be taken before [such department or establishment] *the commission* in such manner and upon such terms and conditions as to the court may seem proper; that [such department or establishment] *the commission* may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts unless within such time and in such manner an appeal shall be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari [applied for] within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of [such department or establishment] *the commission* shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such merchandise as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon [such merchandise] *merchandise imported in violation of this act*, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such merchandise as he shall deem the interests of the United States shall require, *imported by any person violating the provisions of this Act*, shall be excluded from entry into the United States, and upon information of such action by the President,

the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the [findings] *finding* of the President shall be conclusive, unless within ten days thereafter he shall revoke or modify the same, in which case such revocation or modification shall be conclusive.

(f) That whenever the President [shall find as a fact] *has reason to believe* that any merchandise is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided,* That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

APPENDIX E

SECTION 316 OF THE TARIFF ACT OF 1922 AS AGREED TO IN CONFERENCE

[Matter which conferees proposed to omit inclosed in brackets; matter which the conferees proposed to insert shown in italics]

(1666) SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of [merchandise] *articles* into the United States, or in [its] *their* sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any [findings] *decisions* under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon [the initiative of such department or independent establishment] *its initiative*.

(c) That the commission shall make such investigation under and in accordance with such rules as

it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and [decision] *findings* in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such [merchandise] *articles*; that such findings [and decision], if supported by evidence, shall be conclusive, [unless] *except that* a rehearing [shall] *may* be granted by the commission, [or unless] *and except that*, within such time after [entry of said decision] *said findings are made* and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal [shall] *may* be taken from said [finding and decision] *findings* upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such [merchandise] *articles*; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts

or make new findings by reason of additional evidence, which, if supported by [the] evidence, shall be conclusive as to the facts [unless] *except that* within such time and in such manner an appeal [shall] *may* be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such [merchandise] *articles* as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon [merchandise] *articles* imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such [merchandise] *articles* as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the [findings] *decision* of the President shall be conclusive [, unless within ten days thereafter he

shall revoke or modify the same, in which case such revocation or modification shall be conclusive].

(f) That whenever the President has reason to believe that any [merchandise] *article* is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided,* That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

APPENDIX F

DECEMBER 27, 1928.

Schedule of all complaints under Section 316 considered by the Tariff Commission

Subject	Date filed	Investigation ordered	Remarks
Briarwood pipes	Jan. 4, 1923	Aug. 11, 1923	Findings completed Apr. 26, 1924; approved by President May 13 1924.
Engraving and printing	Jan. 17, 1923		No formal complaint; dismissed Apr. 16, 1923.
Tartaric acid	Mar. 12, 1923		Dismissed without prejudice Apr. 19, 1923.
Revolvers	May 28, 1923	June 5, 1924	Findings completed July 14, 1925; approved by President June 23, 1926. T. D. 41650.
Sanitary napkins	Apr. 15, 1924	Oct. 14, 1924	Findings completed Mar 15, 1926; approved by President May 15, 1926.
Portland cement	May 5, 1924		Dismissed without prejudice Apr. 14, 1926.
Olive oil	May 30, 1924		Dismissed Sept. 30, 1926.
Mesh bags	June 7, 1924		Dismissed without prejudice May 6, 1926.
Wrenches	Dec. 26, 1924		Dismissed without prejudice Apr. 26, 1926.
Tuning pins	Feb. 7, 1925		Dismissed Sept. 30, 1926.
Harness leather	Feb. 18, 1925		Do.
Wire rope	July 1, 1925		Do.
Granite	Feb. 25, 1926		Dismissed without prejudice May 15, 1927.
Manila rope	Apr. 14, 1926	Apr. 26, 1926	Findings completed Feb. 28, 1927; approved by President June 13, 1927. T. D. 42287.
Thermometers and barometers.	Apr. 2, 1927		Dismissed without prejudice Nov. 26, 1927.
Sodium nitrate	Nov. 10, 1923		Dismissed Mar. 27, 1928.
Pineapples	Apr. 20, 1924		Do.
Cocoa butter	July 5, 1924		Dismissed June 26, 1926.
Artificial teeth	Feb. 9, 1925		Do.
Oriental rugs	Jan. 26, 1926		Dismissed Feb. 12, 1926.
Bakelite, Form C	Dec. 16, 1925	Apr. 16, 1926	Findings completed May 26, 1927; appeal taken to Court of Customs Appeals July 13, 1927. See T. D. 42627.
Dolls and doll heads	Sept. 3, 1926		Dismissed Mar. 27, 1928.
Laminated bakelite products.	Apr. 22, 1927	Dec. 23, 1927	Findings completed and sent to interested parties Mar. 23, 1928; approved by President June 1, 1928.
Wearing rugs	Aug. 26, 1927		Dismissed Mar. 27, 1928.

APPENDIX G

DIGEST OF CASES UNDER SECTION 316 SUBMITTED TO THE PRESIDENT

BRIERWOOD PIPES

In that case claim was made that low-grade pipes were being imported and sold at less than cost and that this was unfair. The finding of the Commission was that in the process of manufacture the grading could not be done until much work had been expended on the pipes and the method of selling defective ones below cost was not unfair. It recommended no action by the President. The President approved this report but assumed to make a finding of his own stating that the existence of unfair methods of competition "has not been established to my satisfaction."

REVOLVERS

In that case the charge was of importation of revolvers imitating in appearance those of Smith & Wesson, domestic manufacturers. Finding of the Commission was that unfair competition existed, and its recommendation was that no increase of duty would afford protection against this kind of competition, and that revolvers of certain appearance made by certain named foreign manufacturers should be excluded. The President thereupon made an order stating:

> The record of the hearings and findings of the Tariff Commission establishes to my satisfaction the existence of unfair methods and acts within the meaning of said Section 316.
>
> I am also satisfied and find that the importation and sale of such copying or simulating revolvers constitute extreme cases of unfair methods and acts as aforesaid, and that the assessment of additional duty as provided in subdivision (e) of said section 316 will not offset such unfair methods or acts.

He thereupon proceeded to find and direct that the revolvers in question made by certain named manufacturers be excluded.

SANITARY NAPKINS

The charge there was of importation of napkins in such containers and under such appearance as to deceive the public and lead it to believe that the articles were of a well-known domestic manufacture. The Commission found that there was no deception and recommended no action. The President approved the recommendation.

MANILA ROPE

The charge in that case was that rope called manila rope, containing other than pure manila fiber, was being imported and deceiving the public. The finding of the Commission sustained the charge and held that unfair competition resulted and an increased duty would afford no protection, and recommended the exclusion of rope labeled manila, which was not pure manila. The Presi-

dent thereupon made an order saying: " I am also satisfied and find that the importation and sale of such rope constitute extreme cases of unfair methods." He ordered the rope so labeled excluded.

CERTAIN LAMINATED PRODUCTS

The charge here was of patent infringement by importation of infringing merchandise. The Commission found infringement and resulting unfair competition, and that raising duty would not offset the unfair competition, and recommended the exclusion of the laminated products. The President found:

> The record in the investigation by the Tariff Commission establishes to my satisfaction the extents of unfair methods of competition and unfair acts within the meaning of said section 316 * * * I am also satisfied and find that the importation and sale of such laminated products constitute extreme cases of unfair methods and acts as aforesaid and that the assessment of an additional duty as provided in subdivision (e) of said section 316 will not offset such unfair methods and acts.

He ordered the offending merchandise excluded.

APPENDIX H

Memorandum in the Congressional Record on the Powers of Congress to Establish Courts

Congress exercises the function of creating courts under several different grants of power. It is expressly given the power of creating inferior courts to the Supreme Court of the United States in the administration of Federal justice under the grant of Article III of the Constitution. These courts exercise jurisdiction within the borders of each State in all cases described in the third article as judicial power extended by that article to the United States. Congress may create courts to exercise complete jurisdiction over the District of Columbia, as given it by reason of the exclusive governmental jurisdiction that it has over the District vested expressly by the Constitution. Congress may in the same way create courts to exercise complete and exclusive judicial jurisdiction over the Territories of the United States under that provision of the Constitution which gives Congress the right to impose needful regulations over the territory and property of the United States. This latter power is also said by Chief Justice Marshall and others to grow out of the power of the United States as a sovereign to govern the territory which it owns not, in the States. In the same way it may be properly said that were there no third article to

the Constitution, the United States as a sovereign Government could create courts to decide cases arising between it and private individuals, to construe and decide questions arising between the Government and such individuals in reference to its own taxes, its own grants, and in reference to its own debts. In other words, I conceive that without the special grant of power under the third article of the Constitution Congress could exercise the power of a sovereign, create a court of claims to pass on the debts which the United States may owe to individuals, on grants of lands which it may have granted to individuals, to grants of patent rights which it may have granted to individuals, and to the construction and decision of cases arising under the customs or internal revenue laws affecting the payment of the revenue which a sovereign must collect in order that it may live. With reference to these latter courts, it may be said that the same rigid rule would not be applied to the functions which Congress may give to them as to whether they shall be purely judicial or not, as has been applied in respect to courts that exercise a Federal jurisdiction under the third article of the judicial power of the United States, as distinguished from the general administration of justice by the States within State borders, which could not exist but for the third article. In this way the Court of Claims, the Court of Customs Appeals, and a court of patents may be easily distinguished from the power of the Supreme Court and its subordinate courts under the third article in respect to limitation to strictly judicial functions.

The Supreme Court and the subordinate courts of the United States, exercising jurisdiction within the several States of the Union, all deal with cases and controversies in the sense of the third article of the Constitution, but as to courts which are not concerned with the exercise of judicial power within or affecting the several States, there is reason to believe that they stand on a different plane, and that as they are brought into being and exist in virtue of the sovereignty of the United States, and of its power to do all that is essential to the effective exercise of a government, such as aiding in the enforcement of the taxation laws, aiding in the administration and enforcement of the public land laws and the Indian laws, and in the ascertainment and determination of claims against the United States and the administration of the laws relating to the granting of patents, copyrights, and trade-marks, they may be invested with jurisdiction and powers which lie outside of and beyond the controversies and cases which are comprehended by the third article of the Constitution. Illustrations of this will be found in the court of private-land claims, which for many years ascertained and reported the facts respecting conflicting claims to lands, jurisdiction over which was ceded to the United States by Mexico, to the special Indian court, which dealt with claims to citizenship of the Five Civilized Tribes in the Indian Territory when Congress was preparing that region for admission to the Union as a State, to the Court of Claims, and especially its power and authority to examine and report on claims, at the instance of

either House of Congress or at the instance of any of the executive departments of the Government. In *Gordon* v. *United States* (117 U. S. Appendix 697, 699), Chief Justice Taney said:

> "So far as the Court of Claims is concerned, we see no objection to the provisions of this law. Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress or a head of any of the executive departments."

And while in that and other cases it is held that where the action of such a tribunal is intended to be advisory only, and in aid of legislative or administrative action, there can be no review by the Supreme Court, the cases all recognize that Congress, consistently with the Constitution, may establish special tribunals and clothe them with power to ascertain and decide facts and report them as a basis for legislative or administrative action without putting them in the form of a controlling judicial judgment.

The case of the *Postum Cereal Co.* v. *California Fig-Nuts Co.*, decided January 3, 1927, following the case of *Keller* v. *The Potomac Electric Power Co.* (261 U. S. 428), which in turn followed the case of *Baldwin* v. *Howard* (256 U. S. 35), and *Muskrat* v. *United States* (219 U. S. 346), were cases in which the jurisdiction of the Supreme Court of the United States was in question, and it was held that its power and jurisdiction as a court was lim-

ited to judicial cases and controversies and could not extend to mere decisions as by a commission or special tribunal created for the purpose of aiding governmental functions, whether legislative or administrative. [Cong. Rec. vol. 68, pt. 3, p. 3181, 69th Cong., 2d Sess.]